Syed Ahmad Imdadz B Said Abas v Imej Muhibah Sdn Bhd (Majlis Peguam Malaysia, intervener)

HIGH COURT (IPOH) — ORIGINATING SUMMONS NO AA-17A-1–08 OF 2019
SU TIANG JOO JC
17 APRIL 2021

Legal Profession — Disciplinary proceedings — Appeal against decision of Disciplinary Board — Whether finding of liability of Disciplinary Committee affirmed by Disciplinary Board ought to be set aside — Whether appellant entitled to reasonable opportunity to be heard before Disciplinary Board makes an order that was likely to be adverse against him — Legal Profession Act 1976 s 103D(1), (2) & (4)

The case concerned whether an advocate and solicitor should be given a reasonable opportunity to be heard before the Advocates and Solicitors Disciplinary Board ('the DB') made an order that was likely to be adverse against him if the DB intended to impose a greater or lesser penalty or punishment than that recommended by the Disciplinary Committee ('the DC'). The appellant was an advocate and solicitor practising as a sole practitioner in the law firm of Messrs Syed Anuar & Associates. The respondent complained to the DB that the appellant was suspected of having acted in conflict of interest and having conspired to defraud it. The respondent complained that as a developer, it had entered into a joint-venture agreement ('the JVA') with Pintar Asiamas Sdn Bhd ('the landowner') who was to be alienated a piece of state land by the state authority of Perak, to develop a land into a housing scheme to comprise 116 terrace housing lots. The appellant witnessed the execution of the JVA by the land owner as well as the power of attorney ('the PA') given by the landowner to the respondent. It subsequently came to the knowledge of the respondent that during the pendency of the JVA, the land owner who was obliged not to sell the land to any third party, had entered into a sale and purchase agreement ('the SPA') to sell the same piece of land comprising 116 lots of vacant lands to Ken Han Sdn Bhd. The SPA was prepared by Messrs Syed Anuar & Associates and the appellant had witnessed the execution of the SPA by both the landowner and Ken Han Sdn Bhd. The appellant denied that it acted for any party to the JVA. The appellant asserted that he was not privy to the terms and conditions of the JVA and the appellant's role was merely to witness and attest the execution of the JVA and the PA by the land owner. The DC recommended that the appellant be subject to s 103(1)(c)(iii) of the Legal Profession Act ('the LPA') and be suspended from practice for two years. On 21 June 2019, the DB affirmed the DC's finding on liability but rejected the DC's recommendation on punishment and ordered

the appellant to pay a fine of RM30,000 to the Disciplinary Fund and in default, the provisions of s 103(1) of the LPA would apply. The issues for the determination in the High Court were: (a) whether the finding of the liability by the DC which was affirmed by the DB ought to be set aside; and (b) whether the appellant was entitled to be given a reasonable opportunity to be heard before the DB made an order that was likely to be adverse against him. The intervener contended that the need for the DB to give the appellant a reasonable opportunity to be heard before it made the order meting out a punishment against the appellant was only required where the DB enhanced the penalty or punishment by the DC. The appellant contended otherwise. The intervener submitted that it was not needed for the appellant to be given an opportunity to be heard as the order made by the DB could not be viewed as adverse since it had acted favourably on behalf of the appellant by reducing the punishment from that recommended by the DC.

Held, affirming the finding of liability, setting aside the DB's order of punishment and remitting the matter back to the DB:

(1) With the undisputed fact that the appellant acted in drawing up the SPA to sell the 116 lots of land during the pendency of the JVA, the DC's finding of professional misconduct could not be assailed. The DB affirmed the decision of the DC on the latter's finding of liability against the appellant. The DB gave no reason for doing so but if it affirmed the decision of the DC on the finding, it did not need to give any reason. In the circumstances, premised upon the evidence that was obtained, the court had no reason to interfere with the DB's exercise of its power to affirm the DC's finding of liability as against the appellant pursuant to s 103D(1) of the LPA (see paras 25 & 29–30).

(2) The introduction of the word 'or lesser' to sub-s 103D(2) of the LPA, the requirement of the DB to afford an advocate and solicitor an opportunity to be heard was no longer fettered by it wanting to impose a punishment greater than that recommended by the DC as laid down in the Court of Appeal's case of *Wan Ahmad bin Wan Daud lwn Wan Jawahir bt Haji Harun* [2016] 2 MLJ 51. The court was of the view that, before the DB intended to impose any punishment, it ought to give the advocate and solicitor a reasonable opportunity to be heard. The court had no reason to interfere with the finding of liability of the DC which was affirmed by the DB but as the DB sought to impose a punishment or penalty upon the appellant, which would be an order that was likely to be adverse against the appellant, it should have notified him of its intention to do so and given him a reasonable opportunity to be heard (see paras 37, 43 & 56–58).

[Bahasa Malaysia summary

Kes ini adalah untuk memutuskan sama ada seorang peguam bela dan peguam cara patut diberikan peluang untuk didengar dihadapan Lembaga Disiplin Peguambela dan Peguamcara (DB) sebelum satu perintah dibuat yang mungkin tidak memihak kepadanya sekiranya DB berniat untuk mengenakan hukuman atau penalti yang lebih berat daripada apa yang dicadangkan oleh Jawatankuasa Disiplin (DC). Perayu merupakan seorang peguambela dan peguam cara yang beramal sebagai seorang pemilik tunggal firma guaman Tetuan Syed Anuar & Associates. Responden telah mengadu kepada DB bahawa perayu disyakki telah bertindak dalam keadaan yang mewujudkan percanggahan kepentingan dan telah turut serta dalam satu konspirasi untuk meniunya. Responden mengadu sebagai seorang pemaju, dia telah memasukki satu perjanjian usaha sama (JVA) dengan Pintar Asiamas Sdn Bhd (pemilik tanah) yang perlu mengasingkan satu tanah negeri daripada pihak berkuasa Perak, untuk memajukan tanah tersebut kepada satu skim perumahan yang terdiri dariapda 116 lot perumahan teres. Perayu telah menjadi saksi kepada perlaksanaan JVA oleh pemilik tanah dan juga surat kuasa wakil (PA tersebut) yang diberi oleh pemilik tanah kepada responden. Ianya kemudian hadir ke pengetahuan responden bahawa semasa JVA berjalan, pemilik tanah yang mempunyai tanggungjawab untuk tidak menjual tanah tersebut kepada mana-mana pihak ketiga telah memasukki satu perjanjian jual beli (PJB) untuk menjual tanah yang sama yang terdiri daripada 116 lot tanah kosong kepada Ken Han Sdn Bhd. PJB telah disediakan oleh Tetuan Syed Anuar & Associates dan perayu telah menyaksikan perlaksanaan PJB oleh pemilik tanah dan Ken Han Sdn Bhd. Perayu menafikan dia bertindak bagi mana-mana pihak untuk JVA tersebut. Perayu menyatakan dia tiada pengetahuan mengenai terma dan syarat JVA dan peranan perayu hanya untuk menyaksikan dan mengesahkan perlaksanaan JVA dan PA oleh pemilik tanah DC mencadangkan agar perayu tertakluk kepada s 103(1)(c)(iii) Akta Profession Undang-Undang ('LPA') dan digantung daripada amalannya untuk tempoh dua tahun. Pada 21 Jun 2019, DB mengesahkan dapatan berkaitan degnan liabiliti namun menolak cadangan hukuman dan mengarahkan perayu membayar denda sebanyak RM30,000 kepada dana disiplin dan sekiranya gagal, pertuntukan s 103(1) akan terpakai. Isu untuk diputuskan di Mahkamah Tinggi adalah sama ada: (a) dapatan liabiliti DC yang disahkan oleh DB sepatutunya diketepikan; dan (b) sama ada perayu berhak untuk diberikan peluang yang munasabah untuk didengar sebelum DB membuat perintah yang mungkin tidak memihak kepadanya. Pencelah mengedaskan bahawa keperluan DB untuk memberikan peluang yang munasabah untuk didengar sebelum ianya membuat perintah untuk menghukum perayu hanya diperlukan apabila DB meningkatkan penalti atau hukuman DC. Perayu berhujah sebaliknya. Pencelah menghujahkan bahawa ianya tidak perlu untuk perayu diberikan peluang untuk didengar kerena perintah yang diberikan oleh DB tidak boleh dilihat sebagai tidak memihak kerana ianya berpihak kepada prayu dengan

mengurangkan hukuman yang dicadangkan oleh DC. A

Diputuskan, mengesahkan dapatan liabiliti, mengetepikan perintah hukuman DB dan meremitkan perkara ini balik ke DB:

(1) Dengan fakta yang tidak dicabar bahawa perayu telah bertindak dalam membuat PJB untuk menjual 116 lot tanah sewaktu JVA berjalan, dapatan DC berkaitan dengan salah laku professional tidak boleh dicabar. DB mengesahkan keputusan DC berkaitan dapatan liabiliti terhadap perayu. DB tidak memberikan apa-apa sebab untuk berbuat sedemikian tapi sekiranya ianya mengesahkan keptusan DC atas dapatan tersebut, ianya tidak perlu memberikan apa-apa alasan, dalamkeadaan ini, berdasarkan keterangan yang telah diperoleh, mahkamah tidak mempunyai apa-apa sebab untuk campur tangan dengan penggunaan kuasa DB untuk mengesahkan dapatan DC berkaitan dengan liabiliti terhadap perayu selaras dengan s 103D(1) APU (lihat perenggan 25 & 29–30). B C D

(2) Kemasukkan perkataan 'atau lebih kurang' kepada sub-s 103D(2) APU, keperluan DB untuk memberikan seorang peguambela dan peguam cara peluang untuk didengar tidak lagi terikat dengan fakta baha ia mahu mengenakan hukuman yang lebih berat daripada apa yang dicadangkan oleh DC sepertima yang diputuskan dalam kes Mahkamah Rayuan di *Wan Ahmad bin Wan Daud lwn Wan Jawahir bt Haji Harun* [2016] 2 MLJ 51. Mahkamah ini berpandangan bahawa, sebelum DB berniat untuk mengeluarkan apa-apa hukuman ianya sepatutnya memberi peguambela dan peguamcara tersebut satu peluang munasabah untuk didengar. Mahkamah tidak mempunyai apa-apa sebab untuk campur tangan dengan dapatan liabiliti DC yang disahkan oleh DB, akan tetapi atas sebab DB cuba untuk mengeluarkan hukuman atau penalti kepada perayu, yang akan merupakan satu perintah yant kebarangkalian tinggi tidak akan memihak kepada perayu, ianya sepatutnya memberi makluman kepadanya akan niatnya untuk berbuat sedemikian dan memberikannya peluang yang munasabah untuk didengar (lihat perenggan 37, 43 & 56–58).] E F G

Cases referred to H

Browne v Dunne (1893) 6 R 67, HL (refd)

Darshan Singh Khaira v Zulkefli bin Hashim (Majlis Peguam Malaysia, pencelah) [2020] MLJU 339; [2020] 1 LNS 260, CA (refd)

Darshan Singh Khaira v Zulkefli Hashim; Majlis Peguam Malaysia (intervener) [2018] 1 LNS 1934, HC (refd) I

Dato' Amelda bt Md Din v Majlis Peguam Malaysia [2018] 8 MLJ 432; [2018] 6 CLJ 602, HC (refd)

Gana Muthusamy v LM Ong & Co [1998] 3 MLJ 341; [1998] 4 CLJ 878, CA (refd)

A *Gurbachan Singh s/o Bagawan Singh & Ors v Vellasamy s/o Pennusamy & Ors (on their behalf and for the 213 sub-purchasers of plots of land known as PN35553, Lot 9108, Mukim Hutan Melintang, Hilir Perak) and other appeals* [2015] 1 MLJ 773; [2015] 1 CLJ 719, FC (refd)

Islamic Renaissance Front Bhd v The Minister of Home Affairs [2020] 5 MLJ
B 399; [2019] 1 LNS 903, CA (refd)

Jaswinder Kaur d/o Gurbachan Singh v Mokhtar Singh a/l Lal Singh (Majlis Peguam Malaysia, intervener) [2017] MLJU 488; [2017] 1 LNS 591, HC (refd)

Public Prosecutor v Sa'ari bin Jusoh [2007] 2 MLJ 409; [2007] 2 CLJ 197, FC
C (refd)

Majlis Peguam v Cecil Wilbert Mohanaraj Abraham [2019] 5 MLJ 159; [2019] 5 CLJ 139, FC (refd)

Mohamad Jamaludin bin Mohamad Amin v Zalina bt Isa [2010] MLJU
D 140; [2010] 5 CLJ 695, HC (refd)

Ong Keh Keong v Lembaga Tatatertib Peguam-Peguam [2020] MLJU 1285; [2020] 10 CLJ 181, CA (refd)

Sithradevi a/p Nagalingam v Masdar bin Hj Darman & Anor (Majlis Peguam Malaysia, intervener) [2021] 2 MLJ 399; [2021] 3 CLJ 677, FC (refd)

E *Wan Ahmad bin Wan Daud lwn Wan Jawahir bt Haji Harun* [2016] 2 MLJ 51; [2016] 4 CLJ 572, CA (not folld)

Zaidon bin Shariff v Public Prosecutor [1996] MLJU 159; [1996] 4 CLJ 441, HC (refd)

F **Legislation referred to**

Federal Constitution art 132(3)(c)

Legal Profession Act 1976 ss 94(2), 103(1), 103C(1), (1)(c)(iii), 103D, 103D(1), (2), (3), (4), 103E, 103E(5)

Rules of Court 2012 O 59 r 6(2)

G

Ahmad Yani Aminuddin (Mior Muhammad Fadhli bin Mior Shaifuddin and Nurul Jannah bt Mohd Joaini with him) (Nurul Fadhli & Partners) for the appellant.

Ranjan N Chandran (Hakem Arabi & Assoc) for the respondent.

H *Robin Lim Fang Say (Chan & Assoc) for the intervener (Majlis Peguam Malaysia).*

Su Tiang Joo JC:

I Q: Should an advocate and solicitor be given a reasonable opportunity to be heard before the Advocates and Solicitors Disciplinary Board ('DB') makes an order that is likely to be adverse against him if the DB intends to impose a greater or lesser penalty or punishment than that recommended by the Disciplinary Committee ('DC')?

INTRODUCTION

[1] On the 3 March 2021, this court answered the above in the affirmative and remitted the matter to the DB for the advocate and solicitor to be given a reasonable opportunity to be heard before the DB makes an order that is likely to be adverse against him. Dissatisfied, the Bar Council Malaysia by notice of appeal dated 1 April 2021 appeals to the Court of Appeal.

[2] In making the order of 3 March 2021, this court had upheld the decision of the DB affirming the finding of the DC on liability against the advocate and solicitor. Dissatisfied, the advocate and solicitor by notice of appeal dated 2 April 2021 appeals to the Court of Appeal.

[3] The appellant, Syed Ahmad Imdadz B Said Abas, is an advocate and solicitor, practising as a sole proprietor in the law firm of Messrs Syed Anuar & Associates in Ipoh, Perak.

[4] By letter dated 4 October 2016, the respondent had complained to the DB that the appellant is suspected of having acted in conflict of interest and having conspired to defraud it.

[5] In summary, the respondent complained that as a developer, it had entered into a joint-venture agreement dated 1 August 2012 ('JVA') with Pintar Asiamas Sdn Bhd ('landowner') who was to be alienated a piece of State Land measuring approximately 11 acres by the State Authority of Perak, to develop the land into a housing scheme to comprise 116 terrace housing lots. The appellant witnessed the execution of the JVA by the landowner as well as the power of attorney ('PA') given by the landowner to the respondent and which was also dated 1 August 2012.

[6] It subsequently came to the knowledge of the respondent that during the pendency of the JVA, the landowner who was obliged not to sell the land to any third party, had entered into a sale and purchase agreement dated 9 October 2013 ('SPA') to sell the same piece of land comprising 116 lots of vacant land to Ken Han Sdn Bhd. This sale and purchase agreement was prepared by Messrs Syed Anuar & Associates and the appellant had witnessed the execution of this agreement by both the landowner and Ken Han Sdn Bhd.

[7] The appellant denied it acted for any party to the JVA. He asserted that he was not privy to the terms and conditions of the JVA and his role was merely to witness and attest the execution of the JVA and the PA by the landowner. And, given this limited role, there is no misconduct on his part.

[8] In reply, the respondent asserted that in any event, in drawing up the SPA, the appellant would have become appraised of the terms of the JVA and would be aware that both the JVA and the SPA were to do with the same land.

DISCIPLINARY COMMITTEE ('DC')

[9] The complaint by the respondent was duly heard by way of a formal inquiry before a DC on 21 February 2018. The hearing was concluded on 19 March 2018. From the DC's report (encl 15 pp 81–138) the following findings of liability (encl 15 pp 134–137) and recommendations for punishment (encl 15 p 138) were made against the appellant.

Liability

[10] Premised upon, inter alia, the documentary evidence in the form of a bill (encl 15 p 98) found by the DC to be that of the appellant's for preparing the JVA and the PA and, three covering letters (encl 15 pp 99–104) on payment of compensation to squatters on the land and copied to the appellant together with the JVA and PA, the DC found that the appellant had acted for both parties to the JVA including the respondent and had collected the fees for the same.

[11] The manager of the respondent gave evidence. He testified that the respondent paid for the abovementioned bill and the compensation meant for the squatters and that the bill and the three covering letters for payment were prepared by the appellant copied to himself.

[12] During the cross-examination of the manager, it was never put to him that the bill (encl 15 p 98) carrying the letterhead of the law firm of the appellant, M/s Syed, Anuar & Associates, levying fees for the preparation of the JVA and PA as well as seeking stamping fees for the JVA and the PA was forged. And, it was also not put to the manager that the appellant did not prepare the three covering letters which carry the statement that the letters were copied to the appellant.

[13] The appellant was represented by his counsel during the hearing before the DC. With the appellant having 'declined to avail himself of the opportunity to set out his essential and material case in cross-examination, it must follow that he believed that the testimony given could not be disputed at all'. See the oft-quoted decision in *Browne v Dunne* (1893) 6 R 67 a decision of the English House of Lords and cited with approval by many of our courts in Malaysia.

[14] The DC went on to find that:

having played a major role in the preparation of the JVA, any action on the part of the appellant in the disposal of the land involved significant risk of conflict of interest and any attempt to cover up the conflict turns it into a misconduct on the part of the solicitor. Sacrificing the interest of one client for self-benefit or for the benefit of others is a conduct unbefitting of an advocate and solicitor

(Encl 15 page 137 para 24).

[15] The DC found that it is 'more than convinced' that the appellant 'owed a duty of care' to the respondent (encl 15 p 137 para 23) and in rather cryptic terms said it is left with 'a lingering doubt to the honesty' of the appellant (encl 15 p 136 para 22).

[16] Although the following further findings were placed under its recommendations, I am of the view that it would be more appropriate to set them out here under findings on liability by the DC namely that the appellant is guilty of misconduct which amounts to grave impropriety that is to say, gross disregard of his client's interest and the appellant's conduct is unbefitting of an advocate and solicitor which brings the legal profession into disrepute (encl 15 p 138 para B).

Recommendation (on punishment)

[17] The DC recommended that the appellant be subject to s 103C(1)(c)(iii) of the Legal Profession Act ('the LPA') and be suspended from practice for two years (encl 15 p 138 para B).

[18] For ease of reference, the provisions of s 103C(1)(c)(iii) is reproduced hereunder:

103C(1) *Upon conclusion of the inquiry, a Disciplinary Committee shall record its findings in relation to the facts of the case and according to those facts shall determine and make any one of the following recommendations to the Disciplinary Board*:

(c) *that cause for disciplinary action exists and is of sufficient gravity to warrant the advocate and solicitor to be subject to one or more of the following penalties or punishments*:

(i) reprimand or censure;

(ii) imposition of a fine not exceeding fifty thousand ringgit;

(iii) *suspension of the advocate and solicitor from practice, or in the case of a foreign lawyer, recommendation to the Bar Council for suspension of registration, for such period not exceeding five years as the Disciplinary Committee deems appropriate in the circumstances*; or

(iv) striking the advocate and solicitor off the Roll or in the case of a foreign lawyer, recommendation to the Bar Council for revocation of the registration of the foreign lawyer. (Emphasis added.)

DISCIPLINARY BOARD

[19] In the exercise of its powers under s 103D of the LPA, the DB on 21 June 2019 affirmed the DC's finding on liability but rejected the DC's recommendation on punishment and ordered the appellant to pay a fine of RM30,000 to the Discipline Fund and in default, the provisions of s 103(1) shall apply (encl 15 p 140).

[20] The provisions of s 103D and 103(1) of the LPA are set out hereunder:

> 103D After consideration of the report of the Disciplinary Committee, the Disciplinary Board may make an order affirming or rejecting the finding or recommendation of the Disciplinary Committee and if the Disciplinary Board rejects the finding or recommendation of the Disciplinary Committee, the Disciplinary Board shall record the reason for the rejection.
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> 103(1) Where the Disciplinary Board has ordered a fine to be paid by an advocate and solicitor or has ordered a restitution to be made by an advocate and solicitor, such fine shall be paid or such restitution shall be made within one month from the date of the order or such further date as the Disciplinary Board may allow, *and in default thereof* the Disciplinary Board *may order* suspension of the advocate and solicitor from practice until the payment of such fine or sum to be restituted or if the advocate and solicitor is currently not in possession of a practicing certificate, order that no Sijil Annual shall be issued to him until payment of the fine or sum to be restituted is made or in the case of a foreign lawyer, recommend to the Bar Council to suspend his registration until the payment of such fine or sum to be restituted is made. (Emphasis added.)

[21] Section 103(1) of the LPA requires a further order to be made in the event of default of the payment of the fine and what the further order is to be but this was not set out in the DB's order of 21 June 2019. This uncertainty by itself ought to have accorded the appellant a reasonable opportunity to be heard on the prospective further penalty or punishment which would include the possibility of a suspension of up to five years.

ISSUES FOR DETERMINATION

[22] The issues that calls for the determination of this court in hearing this appeal are two namely:

(a) whether the finding of liability of the DC which was affirmed by the DB ought to be set aside; and

(b) if the finding of liability is not set aside, whether the sppellant be given a reasonable opportunity to be heard before the DB makes an order that is likely to be adverse against him.

Whether the finding of liability ought to be set aside

[23] The appellant asserted that both the JVA and the PA were not prepared by him. He merely attested or witnessed the execution of the same by the landowner and he was not instructed, appointed and or acted on behalf of the respondent. And, he acted only for the purchaser. In the circumstances, there was no solicitor-client relationship between him and the respondent and he owes no duty to the plaintiff. In *Gurbachan Singh s/o Bagawan Singh & Ors v Vellasamy s/o Pennusamy & Ors (on their behalf and for the 213 sub-purchasers of plots of land known as PN35553, Lot 9108, Mukim Hutan Melintang, Hilir Perak) and other appeals* [2015] 1 MLJ 773; [2015] 1 CLJ 719 the Federal Court in holding that there was a solicitor-client as well as a fiduciary relationship between the first appellant and the respondents and that the first appellant should not have made a profit out of this trust held that:

> [35] It is trite law that in an action against a solicitor by his or her erstwhile client the threshold issue is whether a solicitor-client relationship exists between the plaintiff-client and the defendant-solicitor. In the absence of such relationship the defendant-solicitor in his professional capacity owes no duty to the plaintiff-client.
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> Solicitor-Client Relationship
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> [36] *A solicitor-client relationship may arise either*:
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> (a) by an express agreement between a solicitor and a client; or
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> (b) where there is express assertion by a solicitor to act for the client; or
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> (c) it may be implied.
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> [37] Where it is to be implied it is for the purported client in an action against a solicitor to prove the existence of a solicitor-client relationship between them. Proof of such relationship requires an objective consideration of all the facts and circumstances in order to come to a reasonable conclusion:
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> (a) that the purported client has sought for advice or assistance from the solicitor;
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> (b) that the assistance sought for was within the professional competence of the solicitor;
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> (c) that the solicitor expressly or impliedly agreed to provide such assistance or reasonably should know that the purported client would reasonably rely on him to provide the assistance; and
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> (d) that it was reasonable for the purported client to believe that the solicitor was representing him.
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> [38] It is therefore a matter of evidence to determine whether a solicitor-client relationship exists. Hence, it is essential to consider such evidence adduced including the words and conduct of the parties towards each other. It is also to be noted that fee arrangement or payment is not determinative of the existence of a solicitor-client relationship.

[24] The DC had heard oral evidence given by the manager of the respondent and that of the appellant and had gone through the documentary evidence and came to a finding that the bill (encl 15 p 98) was put up by the appellant for preparing the JVA and the PA and that there were contemporaneous documents in the form of three letters (encl 15 pp 99–104) on payment of compensation to squatters on the land and copied to the appellant which show the latter's involvement beyond that of mere attestation or witnessing of the JVA and the PA. These findings are supported by evidence and support the DC's conclusion that the appellant had acted in conflict of interest and the attempt to cover up the same is conduct unbefitting that of an advocate and solicitor.

[25] Having so held and with the undisputed fact that the appellant acted in drawing up the sale and purchase agreement to sell the 116 lots of land during the pendency of the JVA, the DC's finding of professional misconduct cannot be assailed.

[26] David Wong Dak Wah CJSS speaking for the Federal Court in *Majlis Peguam v Cecil Wilbert Mohanaraj Abraham* [2019] 5 MLJ 159; [2019] 5 CLJ 139 said that:

> [37] Another point which we must mention is that the LPA places the primary burden on the disciplinary tribunal in the form of the disciplinary committee and the Bar Council to oversee the conduct of advocates and solicitors. It is a matter of peers judging peers premised on standard of conduct determined by themselves. The court's role is one of review in a form of hearing appeals from any aggrieved party by the order of the DB.

[27] The Court of Appeal in *Gana Muthusamy v LM Ong & Co* [1998] 3 MLJ 341; [1998] 4 CLJ 878 held that:

> It is primarily for members of the Bar to decide what amounts to conduct unbecoming of an advocate and solicitor in particular circumstances, according to standards established by members of that honourable profession. Courts must necessarily exercise caution when entertaining an appeal in which the central question is whether particular conduct is unprofessional and cases meriting curial interference will be rare. Otherwise it will be the court and not the profession that will determine the yardstick of professional behaviour.

[28] It would be interesting to note that the Court of Appeal in *Gana Muthusamy* expressed doubt whether it has the jurisdiction to entertain an appeal as an appeal from the High Court lay directly to the Supreme Court pursuant to s 103E of the LPA but this provision has since been amended by Act A 1444 which came into force on 3 June 2014 with the introduction of s 103E(5) of the LPA providing that any appeal against the decision of the High Court shall be to the Court of Appeal and thereafter to the Federal Court.

[29] The DB affirmed the decision of the DC on the latter's finding of liability against the appellant. The DB gave no reason for doing so but if it affirms the decision of the DC on this finding, it need not give any reason. See *Dato' Amelda bt Md Din v Majlis Peguam Malaysia* [2018] 8 MLJ 432; [2018] 6 CLJ 602 (HC) where the decision of the DB was set aside for failing to provide a reason for rejecting the recommendation of the DC as is statutorily required by s 103D(1) of the LPA.

[30] In the circumstances, premised upon the evidence that obtains, this court has no reason to interfere with the DB's exercise of its power to affirm the DC's finding of liability as against the appellant pursuant to s 103D(1) of the LPA.

Whether the appellant be given a reasonable opportunity to be heard before the DB makes an order that is likely to be adverse against him

[31] Section 103D LPA which was introduced by the Legal Profession (Amendment) Act 2012 and which came into force on 3 June 2014 is reproduced below:

> 103D Consideration by the Disciplinary Board of the report of the Disciplinary Committee
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> (1) After consideration of the report of the Disciplinary Committee, the Disciplinary Board may make an order affirming or rejecting the finding or recommendation of the Disciplinary Committee and if the Disciplinary Board rejects the finding or recommendation of the Disciplinary Committee, the Disciplinary Board shall record the reason for the rejection.
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> (2) The Disciplinary Board may in appropriate cases impose a greater *or lesser* penalty or punishment than that recommended by the Disciplinary Committee.
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> (3) Where the Disciplinary Board does not agree with the finding or recommendation of the Disciplinary Committee, the Disciplinary Board shall make such other order as it deems just.
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> (4) *Before the Disciplinary Board makes an order that is likely to be adverse against an advocate and solicitor under subsection (2) or (3), it shall notify the advocate and solicitor of its intention to do so and give him a reasonable opportunity to be heard.*

[32] Before proceeding further, it would be helpful to set out the provisions of s 103D of the LPA that were applicable prior to 3 June 2014 so that the difference that obtains before 3 June 2014, in particular, that of s 103D(2) of the LPA can be clearly seen here:

> Provisions of section 103D that were applicable prior to 3 June 2014:

A 103D (1) After consideration of the report of the Disciplinary Committee, the Disciplinary Board may make an order —

(a) Affirming the recommendation of the Disciplinary Committee; and

(b) May either accept the recommendations of the Disciplinary Committee
B of the punishment to be imposed or, in exceptional cases, impose a greater punishment.

(2) Before the Disciplinary Board makes an order and imposes a punishment under this section which results in *greater punishment* it shall notify the advocate and solicitor concerned of its intention to do so and give him reasonable opportunity to
C be heard.

(3) Where the Disciplinary Board does not agree with the recommendations of the Disciplinary Committee, the Disciplinary Board shall make such order as it deems just.

D

[33] It is undisputed that the appellant was not heard by the DB before it made the order of 21 June 2019 wherein it had rejected the recommendation of the DC to have the appellant suspended from practice for two years and instead ordered the appellant to pay a fine of RM30,000 *and in default the provisions of s 103(1) shall apply but without clarifying* what further order was to
E be made as is required under s 103(1) in the event of such a default (encl 15 p 140).

[34] The Bar Council Malaysia contends that the need by the DB to give the
F appellant a reasonable opportunity to be heard before it made the order meting out a punishment against the appellant is only required where the DB *enhances* the penalty or punishment recommended by the DC. The appellant contends otherwise.

G **[35]** In support of its contention, the Bar Council Malaysia pointed out that the DC had recommended a punishment of suspension of two years but the DB did not affirm it but instead imposed a fine of RM30,000 and asserted that this is *a lesser punishment* or penalty. The issue of the default penalty or punishment was not canvassed in its submissions.

H

[36] The DB gave as its reason for its rejection of the DC's recommended punishment, that the two years suspension was too harsh and that a fine of RM30,000 would be appropriate in the circumstance (see Annexure A annexed to the letter issued by the DB of 19 November 2019 in encl 15 exh SAI-3 p 2).

I

[37] Section 103(1) LPA requires *a further order* to be made in the event of default of the payment of the fine and what the further order is to be but this *was not* set out in the DB's order of 21 June 2019. This uncertainty by itself ought to have accorded the appellant a reasonable opportunity to be heard on

the prospective further penalty or punishment which would include the possibility of a suspension of up to five years in the event the advocate and solicitor is unable to pay the fine.

[38] In *Jaswinder Kaur d/o Gurbachan Singh v Mokhtar Singh a/l Lal Singh (Majlis Peguam Malaysia, intervener)* [2017] MLJU 488; [2017] 1 LNS 591, the High Court in reference to s 103D(2), (3) and (4) of the LPA held as follows:

> [16] It must be emphasised that there is no need for the Disciplinary Board to give any notice to the appellant before making the Disciplinary Board order dated 14 April 2016 based upon s 103D(4) of the LPA 1976 (read together with s 103D(2) and (3) of the LPA 1976 where:
>
> (a) the Disciplinary Board did not make any order which is likely to be adverse against an advocate and solicitor and which *is greater* than that recommended by the Disciplinary Committee; and
>
> (b) the Disciplinary Board agrees and thereafter affirms the decision of the Disciplinary Committee's recommendation of striking off the appellant from the Roll of Advocates and Solicitors.

[39] In *Darshan Singh Khaira v Zulkefli Hashim; Majlis Peguam Malaysia (intervener)* [2018] 1 LNS 1934, the High Court held:

> [32] Under sub-s 103D(4), the DB is required to notify the advocate and solicitor of its intention to make an order that is likely to be adverse against him under sub-s 103D(2) or (3) and give him a reasonable opportunity to be heard. *Subsections 103D(2) and (3) is applicable where the DB does not agree with the findings or the recommendations of the DC and seeks to impose a greater or lesser penalty or punishment than that recommended by the DC*. Therefore, the requirement of giving a reasonable opportunity to be heard to the appellant before the DB makes a decision is when the DB does not agree with the findings and recommendations of the DC. (Emphasis added.)
>
> [33] However, in the present case, since the DB had affirmed both the findings and recommendations of the DC, there is no statutory requirement for the DB to give the appellant an opportunity to mitigate on the sentence or to be given a notice that he will be struck off the Rolls.

[40] The High Court decision of *Darshan Singh Khaira* was affirmed by the Court of Appeal, see *Darshan Singh Khaira v Zulkefli bin Hashim (Majlis Peguam Malaysia, pencelah)* [2020] MLJU 339; [2020] 1 LNS 260 but no discussion was made on the application of s 103D of the LPA.

[41] In *Wan Ahmad bin Wan Daud lwn Wan Jawahir bt Haji Harun* [2016] 2 MLJ 51; [2016] 4 CLJ 572, the Court of Appeal considered the provisions of s 103D(4) of the LPA prior to its amendment and it was held that:

A [40] Notis yang dikeluarkan oleh Lembaga Tatatertib kepada responden merupakan notis di bawah s 103D(2) dan (4) Akta Profesion Undang-Undang. Oleh itu, apa-apa hukuman yang bakal dikenakan hendaklah *hukuman yang lebih berat daripada apa yang disyorkan oleh Jawatankuasa Tatatertib dan bukannya hukuman yang lebih ringan.*

B [41] Inilah sebabnya kenapa s 103D(4) Akta Profesion Undang-Undang memberi hak untuk didengar kepada responden. Secara logiknya, jika Lembaga Tatatertib tidak berhasrat untuk mengenakan hukuman yang lebih berat dari apa yang disyorkan oleh Jawatankuasa Tatatertib, tidak timbul soal memberi hak untuk didengar kepada responden. Hanya keputusan yang bakal 'adverse' kepada
C responden sahaja yang memerlukan ini diberi.

[42] Dalam hubungan ini, perlu diperhatikan bahawa ayat yang digunakan dalam s 103D(4) ialah 'Before the Disciplinary Board makes an order under subsection (2) or any order that is likely to be adverse against the advocate and solicitor ...' *Subseksyen (2) yang dirujuk dalam s 103D(4) itu bercakap mengenai hukuman yang*
D *lebih berat sahaja dan bukan hukuman yang lebih ringan.*

[42] With the amendment to s 103D(2) of the LPA by Act A1444, with effect from 3 June 2014, the DB may in appropriate cases impose a *greater or lesser* penalty or punishment than that recommended by the DC.
E

[43] For purposes of the present case, with the DB not affirming the recommendation of the DC in terms of punishment and, with s 103D(4) of the LPA being subjected to sub-s (2) the net effect is that, although the DB may
F impose a greater or lesser punishment than that recommended by the DC, *before the DB makes an order that is likely to be adverse* against an advocate and solicitor it shall notify the advocate and solicitor of its intention to do so and give him a reasonable opportunity to be heard.

G **[44]** The Bar Council of Malaysia took the position that as the DB meted out a punishment of a fine of RM30,000 which it asserts is *a lesser* punishment than that recommended by the DC which was a suspension for two years, there was no necessity for the DB to give the appellant a reasonable opportunity to be heard as the order is not likely to be adverse against the appellant.
H

[45] However, with the addition of the words 'or lesser' to s 103D(2) of the LPA, with all due respect, the decision of the Court of Appeal in *Wan Ahmad bin Wan Daud lwn Wan Jawahir bt Haji Harun* would no longer be binding on
I this court. Instead, I am of the opinion that it would be open to this court to relook at s 103D(4) of the LPA afresh in the light of the amendment to s 103D(2) of the LPA with particular emphasis on the words 'order that is likely to be adverse' to the advocate and solicitor.

[46] The word 'adverse' is not defined in the LPA and refence was made by the Bar Council Malaysia to the Oxford English Dictionary which defined it to mean: A

> 1. Acting in opposition to, actively hostile. 2. Opposing any one's interest: hence unfavourable, injurious, calamitous. Const. ME. 3. Opposite in position 1623. B

[47] The Bar Council of Malaysia submitted that the appellant need not be given an opportunity to be heard as the order made by the DB cannot be viewed as adverse since it has acted favourably on behalf of the appellant by reducing the punishment from that recommended by the DC. C

[48] In other words, the Bar Council of Malaysia maintains that despite the introduction of the words 'or lesser' to sub-s (2) of s 103D of the LPA, the position that obtains in s 103D of the LPA prior to its amendment and that in *Wan Ahmad bin Wan Daud lwn Wan Jawahir bt Haji Harun* [2016] 2 MLJ 51; [2016] 4 CLJ 572 is still good, that is, an advocate and solicitor is only entitled to a reasonable opportunity to be heard if the DB metes out a punishment that is *greater* than that recommended by the DC and not otherwise. It, therefore, pegs the right of the opportunity to be heard to be dependent upon the punishment recommended by the DC and the punishment that the DB intends to make must be one greater than that recommended by the DC. D E

[49] Subsection 103C(1) of the LPA read together with sub-s 94(2) of the LPA provides that the DC could recommend that any advocate and solicitor who has been guilty of any misconduct be punished with one or more of the following penalties or punishments and that any advocate and solicitor can be liable: F

(a) to be struck off the Roll or in the case of a foreign lawyer, his registration can be revoked; G

(b) to be suspended from practice for any period not exceeding five years, or in the case of a foreign lawyer, his registration as one can be suspended for such period not exceeding five years; H

(c) to be ordered to pay a fine not exceeding fifty thousand ringgit; or

(d) to be reprimanded or censured.

[50] This begs the question, is the imposition of a fine a lesser punishment than that of a suspension because if a heavy fine had been ordered by the DB instead of a punishment of a short period of suspension than what is recommended by the DC, it becomes rather unclear as to which is a greater or lesser punishment. When the following example is given, it better illustrates the I

A issue, for eg the DC recommends a day's or a week's suspension and the DB rejects the same and instead orders a fine of RM50,000.

[51] When posed this question, counsel for the Bar Council Malaysia candidly replied that it is not clear whether as between a suspension and a fine, B which is a greater punishment.

[52] This would naturally lead to the next question on what is the test that is to be applied to ascertain whether an order made by the DB is likely to be adverse against an advocate and solicitor under sub-s 103D(4) of the LPA. C Should it be a subjective test viewed from the lens of the DB or that of the advocate and solicitor? Or, should it be an objective test viewed from the lens of a reasonable man, a disinterested person armed with all the facts who would say that in the circumstances the punishment sought to be imposed would be D likely to be adverse to the advocate and solicitor.

[53] Of course, if it is to be a subjective test premised upon the view of the DB, it is for the DB to decide and this would mean that the DB has an absolute discretion whether an advocate and solicitor is to be given an opportunity to be E heard simply because with the amendment to s 103D(2), the DB has the right to affirm the recommendation of the DC or mete out a greater or lesser punishment than that recommended by the DC.

F **[54]** Conversely, if it is the advocate and solicitor who is to decide whether the punishment that the DB is imposing upon him is likely to be adverse to him, it is more likely than not that he would wish to be given the opportunity to be heard to mitigate the punishment sought to be imposed upon him. Indeed, any advocate and solicitor worth his salt would wish to take up this G opportunity as any mitigation carries the opportunity to have the proposed punishment reduced or maybe done away with altogether.

[55] The Bar Council, however, submitted that only if the penalty or punishment meted out by the DB is greater than that recommended by the DC H is the advocate and solicitor to be afforded a reasonable opportunity to be heard.

[56] In my view, as alluded to earlier, with all due respect, with the introduction of the word 'or lesser' to sub-s 103D(2) of the LPA with effect I from 3 June 2014, the requirement of the DB to afford an advocate and solicitor an opportunity to be heard is no longer fettered by it wanting to impose a punishment greater than that recommended by the DC as laid down by the Court of Appeal in *Wan Ahmad bin Wan Daud lwn Wan Jawahir bt Haji Harun*.

[57] With respect, there is to my mind no need for either a subjective or an objective test. Instead, at the time I made my decision I was of the view that before the DB intends to impose any punishment it ought to give the advocate and solicitor a reasonable opportunity to be heard. The following are my grounds for the decision I had made namely:

(a) whilst it may be argued that the appellant was given the right to be heard before the DC, it is indisputable that the DC does not mete out any punishment if it finds the advocate and solicitor liable. Instead, it remits its findings to the DB with its findings on liability together with its recommendations on punishment. And, the advocate and solicitor will not know a punishment is to be meted against him until he is notified by the DB;

(b) the burden of finding misconduct against an advocate and solicitor is high, it has to be proven beyond reasonable doubt, *Sithradevi a/p Nagalingam v Masdar bin Hj Darman & Anor (Majlis Peguam Malaysia, intervener)* [2021] 2 MLJ 399; [2021] 3 CLJ 677 (FC) which is a standard required in criminal proceedings;

(c) in *Majlis Peguam v Cecil Wilbert Mohanaraj Abraham* [2019] 5 MLJ 159; [2019] 5 CLJ 139, a complaint against Cecil Abraham, an advocate and solicitor, for professional misconduct was lodged by the Bar Council of Malaysia. Balasubramaniam a/l Perumal ('Bala') who was a prosecution witness in the murder trial of Altantuya Shaaribu had, on 1 July 2008, signed a statutory declaration ('SD') where he had, inter alia, implicated Datuk Seri Najib Tun Razak in a relationship with Altantuya but on 4 July 2008 Bala signed another statutory declaration disavowing the entire contents of his earlier SD alleging it was signed under duress. However, Bala in a three-part video alleged he signed the later SD to retract his earlier SD under duress. The complaint of professional misconduct against Tan Sri Cecil Abraham was to call upon the DB to investigate whether he was the advocate and solicitor who was responsible for or involved in drafting the later SD. It was found that the evidence was not sufficient to make out a case for disciplinary action against Tan Sri Cecil Abraham and the Federal Court held that:

> (2) The standard of proof in disciplinary matters before the BC (sic) is one of beyond reasonable doubt *similar to that of a criminal proceeding. The respondent, like an accused in a criminal trial*, was fully entitled to call upon his armoury of defence available in law to protect himself against the allegations made.

(d) if an accused facing a criminal charge is found guilty, he is entitled to plead in mitigation and in this regard, save for offences that carry a mandatory punishment like for eg capital punishment, all accused are allowed to mitigate; see *Zaidon bin Shariff v Public Prosecutor* [1996]

MLJU 159; [1996] 4 CLJ 441 where Augustine Paul J held that:

> *A mitigation plea should not be treated as a ritualistic step to be summarily rejected the moment it is made. It is a constituent element of the sentencing process. It merits due consideration in light of the facts of each case*, and more so when it is not contradicted by the prosecution as in this case.

(e) wherefore, similar to that of an accused in a criminal trial, the advocate and solicitor ought to be given an opportunity to be heard or to mitigate before *any* punishment is meted out once the DB accepts the finding of liability by the DC;

(f) in keeping with criminal law, if there is any ambiguity in the construction of s 103D(4) of the LPA, any ambiguity must be resolved in favour of the advocate and solicitor and this will mean that the advocate and solicitor must be given a reasonable opportunity to be heard. In *Public Prosecutor v Sa'ari bin Jusoh* [2007] 2 MLJ 409; [2007] 2 CLJ 197 (FC) at para [6] the late Augustine Paul JCA (later a FCJ) speaking for the Federal Court held that the Court of Appeal was right in saying that a penal statute must be strictly construed and, there is a rule of construction that when there is an ambiguity or doubt in the meaning of a word in a penal statute it must be resolved in favour of the subject;

(g) further, with respect, if Parliament meant for such a right to be heard to be only available if the DB were to impose a punishment *greater* than that recommended by the DC, it could have easily said so in s 103D(4) when it introduced the words 'or lesser' by way of amendment to sub-s 103D(2) of the LPA which came into effect on 3 June 2014. Parliament did not;

(h) indeed, it has been recently been reaffirmed by our Court of Appeal in *Islamic Renaissance Front Bhd v The Minister of Home Affairs* [2020] 5 MLJ 399; [2019] 1 LNS 903 that no man may be condemned unheard. Although this case was to do with an administrative action by way of judicial review to quash the order made by the respondent to seize three books published by the appellant, this principle is of universal application. Abu Bakar Jais JCA in allowing the appeal and granting the order to quash the respondent's order of seizure, said:

> [45] *Further, the right of hearing is always available and enshrined without requiring it to be stated in any statutory provisions*. The Federal Court was clear on this principle in *Ketua Pengarah Kastam v Ho Kwan Seng* [1977] 2 MLJ 152; [1975] 1 LNS 72 where Raja Azlan Shah FCJ after referring to several cases unequivocally said:
>
> > *The cases show that a fair hearing is required as a 'rule of universal application', 'founded on the plainest principles of justice'. In particular, the silence of the statute affords no argument for excluding the rule, for the 'justice*

> *of the common law will supply the omission of the legislature.'* These quotations are derived from the case of Cooper v Wandsworth Board of Works, which has several times recently been approved by the House of Lords as expressing the principle in its full width: see *Ridge v Baldwin; Wiseman v Borneman* [1971] AC 297.
>
> *In my opinion, the rule of natural justice that no man may be condemned unheard should apply to every case where an individual is adversely affected by an administrative action, no matter whether it is labelled 'judicial', 'quasi-judicial', or 'administrative' or whether or not the enabling statute makes provision for a hearing*. But the hearing may take many forms and strict insistence upon an inexorable right to the traditional courtroom procedure can lead to a virtual administrative breakdown. (Emphasis added.)
>
> [46] *As indicated there is no dispute that the respondent did not give any right of hearing to the appellant before issuing the orders. This right should have been given following the decision above*.

(i) in *Mohamad Jamaludin bin Mohamad Amin v Zalina bt Isa* [2010] MLJU 140; [2010] 5 CLJ 695 (HC), the DC recommended a fine of RM5,000. The DB disagreed and imposed a punishment of suspension of three years after giving the advocate and solicitor an opportunity to be heard. Although the proceedings were under section 103D LPA prior to the amendment it is pertinent to note that His Lordship Dato Zamani bin A Rahim JC said that:

> I have no doubt that the said Notice is sufficient compliance with *s 103D(4) which housed the doctrine of natural justice and procedural fairness*. (Emphasis added.)

(j) when the entire sub-s 103D(4) of the LPA is read in its entirety, the words *do not* read an order that is 'adverse' but an order that is '*likely* to be adverse';

(k) the *Longman Dictionary of Law* (7th Ed) defines 'likely' as 'probably, expected' and that it is a word protean in character in that its meaning might vary with the context;

(l) the *Oxford Dictionary & Thesaurus* defines 'likely' to be 1. probable, such as well might happen or be true. 2. to be reasonably expected including plausible.

(m) the literal meaning would be that *any* punishment, including that of a reprimand, would be *likely* to be adverse to the advocate and solicitor as it would be a blot on his record and therefore, he ought to be given a reasonable opportunity to be heard and this blot on his record may very well be an issue for eg should he wish to be considered for public office. Although it is to be noted that art 132(3)(c) of the Federal Constitution provides that public service shall not be taken to comprise the office of judge of the Federal Court, the Court of Appeal or a High Court, a

record of misconduct may very well be taken into account by the Judicial Appointments Commission in considering any advocate and solicitor for judicial appointment;

(n) by analogy, an order for costs against a solicitor personally is not to be made unless he has been given an opportunity to be heard, see O 59 r 6(2) of the Rules of Court 2012 which is reproduced below:

> 6 Personal liability of solicitor for costs (O 59 r 6)
>
> (1) Subject to the following provisions of this rule, where in any proceedings costs are incurred improperly or without reasonable cause or are wasted by undue delay or by any other misconduct or default, the Court may make against any solicitor whom it considers to be responsible an order —
>
> (o) disallowing the costs as between the solicitor and his client; and
>
> (p) directing the solicitor to repay to his client costs which the client has been ordered to pay to other parties to the proceedings; or
>
> (q) directing the solicitor personally to indemnify such other parties against cost payable to them.
>
> (2) *An order under this rule shall not be made against a solicitor unless he has been given a reasonable opportunity to appear before the Court and show cause why the order should not be made,* except where any proceeding in Court or in Chambers cannot conveniently proceed, and fails or is adjourned without useful progress being made-
>
> (a) because of the failure of the solicitor to attend in person or by a proper representative; or
>
> (b) because of the failure of the solicitor to deliver any document for the use of the Court which ought to have been delivered or to be prepared with any proper evidence or account or otherwise to proceed.
>
> (3) *Before making an order under this rule the Court may, if it thinks fit, refer the matter to the Registrar for inquiry and report and direct to the solicitor in the first place to show cause before him.*
>
> (4) The Court may, if it thinks fit, direct or authorize the Bar Council to attend and take part in any proceedings or inquiry under this rule, and may make such order as it thinks fit as to the payment of its costs.
>
> (5) The Court may direct that notice of any proceedings or order against a solicitor under this rule shall be given to his client in such manner as may be specified in the direction.
>
> (6) Where in any proceedings before the Registrar; the solicitor representing any party is guilty of neglect or delay or puts any other party to any unnecessary expense in relation to those proceedings, the Registrar may direct the solicitor to pay costs personally to any of the parties to those proceedings.
>
> (7) All references to 'Registrar' in this rule when applied in the Subordinate

Court shall be read as referring to a Judge of the Sessions Court or a Magistrate.

(a) if an order for costs in a civil proceeding is not to be made against an advocate and solicitor personally without giving him a reasonable opportunity to be heard, what more when the advocate and solicitor is likely to be meted a punishment in proceedings which is akin to a criminal trial; and

(b) finally but by no means the least, the Court of Appeal in *Ong Keh Keong v Lembaga Tatatertib Peguam-Peguam* [2020] MLJU 1285; [2020] 10 CLJ 181 was emphatic in holding that:

> [52] *Pursuant to s 103D(4) LPA 1976, it was Parliament's intention that an advocate and solicitor be given the right to make a representation before the Disciplinary Board.* Such representation should have been taken into account before the procedure for punishment is finalised, and it is only at the end of this process that the Disciplinary Board must make a decision with respect to the nature of the punishment to be imposed.

CONCLUSION

[58] I have no reason to interfere with the finding of liability of the DC which was affirmed by the DB but as the DB sought to impose a punishment or penalty upon the appellant, which would be an order that is likely to be adverse against the appellant, it should have notified him of its intention to do so and given him a reasonable opportunity to be heard.

[59] Wherefore, the order of punishment of the DB is set aside with the matter to be remitted back to the DB for the DB to give the appellant a reasonable opportunity to be heard before it makes an order that is likely to be adverse against the appellant and in the circumstances that obtained, I made no order for costs.

Affirmed finding of liability, DB's order of punishment set aside with matter remitted back to the DB

Reported by Mohd Kamarul Anwar